IN THE HIGH COURT OF THE REPUBLIC OF FIJI

WESTERN DIVISION AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 362 OF 1989

BETWEEN : **RAVINDRA DUTT** of Nacovi, Nadi, Farmer as the Administrator of the Estate of Remal Avinesh Sharma (a minor) deceased.

PLAINTIFF

A N D : **SAM NARAYAN** of Valelevu, Nasinu, Driver.

1ST DEFENDANT

A N D : **ALI HASSAN** operating as Sanyo Cabs of Laucala Beach Estate, Suva.

2ND DEFENDANT

A N D : **NEW INDIA INSURANCE COMPANY LIMITED** a limited liability company having its registered office at Suva.

3RD DEFENDANT

Counsel:

Mr M Chand for plaintiff
Mr A Sudhakar for 3rd defendant
No appearance for 1st & 2nd defendant

Date of Hearing : 6 November 2014
Date of Ruling : 2 March 2015

R U L I N G

Introduction

[1]
This is an application to strike out the action for want of prosecution or as an abuse of the process of the court.

[2]
Pursuant to O.25, r.9 of the High Court Rules 1988, as amended (HCR), the court issued, *ex mero motu* (on its own motion), a notice dated 17 June 2014 to all parties requiring to show cause why the action should not be struck out for want of prosecution or as an abuse of the process of the court.

[3]
Following the notice plaintiff filed an affidavit sworn by Krishneel Kunal Kumar, Litigation Clerk employed by Messrs Pillai Naidu & Associates, the solicitors for the plaintiff.

[4]
Third defendant opted not to file affidavit in response to the affidavit filed by the plaintiff purportedly showing cause.

[5]
At hearing, parties (plaintiff and 3rd defendant) agreed and consented to settle the matter by written submissions. The court accordingly granted 14 days for the plaintiff and 14 days thereafter for the 3rd defendant, if need be, to file and serve their respective submissions. Neither party filed written submission. It is no surprise as usual the plaintiff on 27 February 2015 filed his late submission after the court issued notice on 26 February 2015 notifying the parties that the matter is listed for ruling on 2 March 2015. I nevertheless considered his submission in this ruling.

Background

[6]
In November 1989 Ravendra Dutt, the plaintiff as administrator of estate of Remal Avinesh Sharma (a minor) deceased, commenced proceedings against the defendants seeking general and special damages. The claim arises out of an accident allegedly caused by first defendant on 24 November 1986 in which he collided with a Remal Avinesh Sharma (plaintiff's son) who thereby sustained severe injuries from which he died on the same day. On 14 December 1989 second and third defendant filed statement of defence. In

April 1996 some 6 years after commencement of the proceedings the second plaintiff, Nausad Ali was substituted by Ali Hassan on the application of the plaintiff. An amended writ of summons was filed in November 1996. Only third defendant filed amended statement of defence. In October 1997 a default judgment was entered against the second defendant with damages to be assessed. On 24 October 1997 plaintiff filed notice of assessment of damage and cost against the second defendant. It is not clear whether the notice of assessment of damage was served on the second defendant or not. However, hearing on notice of assessment was set down for 12 June 2002. On 14 May 2002 the second defendant filed application to set aside the default judgment. On 12 June 2002 hearing on assessment did not proceed. Thereafter, the third defendant filed a strike out application to strike out the claim as it discloses no reasonable cause of action as against the third defendant. On 7 March 2003 the court directed the parties to file written submissions on setting aside application. The second and the third defendant accordingly filed their written submissions but the plaintiff did not. Instead, the plaintiff filed a strange notice of motion seeking order that 1st and 3rd defendants be served with the summons to set aside. By that time the writ of summons was not served on the 1st defendant. On 11 June 2004 the court by consent made order that the statement of claim discloses no reasonable cause of action against the 3rd defendant. On 23 March 2006 the plaintiff filed ex-parte notice of motion seeking leave of the court to issue and serve writ of summons and statement of claim against the 1st and 2nd defendants by substituted service. On 24 March 2006 the court granted leave for substituted service. Afterwards, a notice to 1st and 2nd defendant was advertised in the Fiji Sun on 2 May 2006 and an affidavit of service was filed in proof thereof on 16 May 2006. Thereafter the plaintiff did not take any step to progress the matter except that he filed a notice of intention to proceed on 16 March 2012. Since the matter was dormant from 16 May 2006 the court issued notice under O.25, r.9 to the plaintiff to show cause why the action should not be struck out for want of prosecution.

The Law

[7]
The rule relating to striking out for want of prosecution is O.25, r.9 of HCR. That rule states:

> *"(1) If* ***no step*** *has been taken in any cause or matter* ***for six months*** *then any party on application or the Court of its own motion may list the cause or matter for the parties* ***to show cause why it should not be struck out for want of prosecution*** *or* ***as an abuse of the process of the Court.***
>
> *2) Upon hearing the application the Court may either* ***dismiss*** *the cause [or] matter on such terms as may be just or* ***deal with the application as if it were a summons for directions.***(Emphasis added)" .

Discussion

[8]
The case was dormant until the court issued notice on its own motion on the plaintiff on 20 June 2014 calling for the defendant to show cause why the action should not be struck out for want of prosecution or as an abuse of the process of the court.

[9]
In response the plaintiff filed affidavit of Krishneel Kunal Kumar, Litigation clerk of Messrs Pillai Naidu & Associates, the solicitors for the plaintiff. It will be noted that the plaintiff did not swear an affidavit by himself to show cause.

[10]
The question that arises in this case is that whether a clerk employed by the plaintiff's solicitors can swear an affidavit on behalf the plaintiff.

[11]
In **Seva Varani v Aanuka Island Resort Ltd & another** (HBC 161 of 2012L) this court held that an affidavit sworn through solicitor's clerk was improper and the court cannot give it any weight whatsoever.

[12]
The plaintiff appears to be hibernating. He does not even know what is happening to his case. He ought to have filed an affidavit explaining the delay in prosecuting the matter. By failing to swear a show cause affidavit at least he has shown that he has no cause to show or that he has no intention to prosecute the matter.

[13]
The matter has been dormant since 16 May 2006. The plaintiff should have proceeded with the matter by an application for ex parte judgment against the 1st and 2nd defendant after filing affidavit of service in proof of substituted service which the plaintiff failed to do. It is to be noted that the plaintiff found out that the summons on 1st and 2nd defendant was not service in March 2006 after filing the action in November 1989. Instead of taking any step to bring the matter into termination, the plaintiff filed notice of intention to proceed in March 2012, viz. 6 year after filing affidavit of service for substituted service. Even after filing notice of intention to proceed the plaintiff did not take any step to progress the matter until the court issued O.25, r.9 notice on 20 June 2014.

[14]
'The court had power to strike out a claim for want of prosecution, not only in cases of inordinate and inexcusable delay which caused prejudice to the defendant, but also where the court was satisfied that the default was 'intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court': **Birkett v James** [1977]2 All ER 801at 805, [1978] AC 297 at 318 per Lord Diplock.

[15]
The delay in carrying the matter that was commenced in November 1989 to trial undoubtedly shows the plaintiff had no intention to bring the matter to termination. This behaviour of attitude is clearly abuse of the process of the court. The plaintiff submits in his late submission that delay on the part of the plaintiff was not inordinate to cause serious prejudice to the defendant. I am unable to accept this submission, for the court could also strike out a

claim on the ground that the plaintiff had no intention to carry the case to trial without the necessity to show prejudice.

[16]
The preposition of **Birkett v James** (supra) is that the court could strike out a claim as an abuse of process for intentional and contumelious conduct amounting to an abuse of the process of the court without the necessity to show prejudice that the fact that a strike out might extinguish substantive rights is not a bar to such an order.

[17]
In **Grovit v Doctor and Others (1997) 1 WLR 640** at 641 H.L) it was held:
"That for a plaintiff to commence and to continue litigation which he had no intention to bring to a conclusion could amount to an abuse of process; and that, accordingly, once the court was satisfied that the reason for the delay was one which involved an abuse of process in maintaining proceedings when there was no intention of carrying the case to trial it was entitled to dismiss the action."

Conclusion

[18]
To conclude, the plaintiff has failed to take any steps for over eight (8) years. The plaintiff only found out in March 2006 the fact that the summons was not served on 1st and 2nd defendant. This clearly shows the plaintiff's intentional conduct amounting to an abuse of the process of the court. The delay in this case is not only inordinate, but also inexcusable. I am satisfied that the plaintiff had no intention of carrying the case to a conclusion. Therefore I have no option but to strike out the claim for want of prosecution and as an abuse of the process of the court. Making any other order would bring the administration of justice into disrepute among right-thinking people. I would decline to make any order as to cost as the matter was moved by the court's own volition.

Final Outcome

[19]
The final outcome of this ruling is that the claim of the plaintiff filed on 24 November 1989 and subsequently amended on 6 November 1996 is dismissed and struck out for want of prosecution and as an abuse of the process of the court with no order as to costs. Order accordingly.

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M H Mohamed Ajmeer
Puisne Judge

At Lautoka

02/03/2015